

1 Pamela A. McKay (SBN 7812)
2 **MCKAY LAW FIRM, CHTD.**
3 9320 Sun City Blvd., Suite 104
4 Las Vegas, NV 89134
5 Phone: 702-835-6956
6 Fax: 702- 835-6957
7 pmckay@mckaylawfirmchtd.com

8 Attorneys for Plaintiff/Counter-Defendant
9 ATAIN SPECIALTY INSURANCE COMPANY

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF NEVADA
12

13 ATAIN SPECIALTY INSURANCE
14 COMPANY, a Michigan corporation

15 Plaintiff,

16 vs.

17 RENO CAB COMPANY, INC. d/b/a RENO-
18 SPARKS CAB, a Nevada corporation, and
19 RICHARD L. WARNE, an individual,

20 Defendants.

21 RENO CAB COMPANY, INC. d/b/a RENO-
22 SPARKS CAB, a Nevada corporation, and
23 RICHARD L. WARNE, an individual,

24 Counterclaimant,

25 vs.

26 ATAIN SPECIALTY INSURANCE
27 COMPANY, a Michigan corporation,

28 Counterdefendant.

) CASE NO. 3:15-cv-00406-MMD-CBC

) ORDER ON
) STIPULATED MOTION TO STRIKE AND
) VACATE ORDER ON CROSS-MOTIONS
) FOR SUMMARY JUDGMENT (DOC. 154)

///

///

///

///

1 Plaintiff/Counter-defendant, ATAIN SPECIALTY INSURANCE COMPANY (Atain), by
2 and through its counsel of record, Pamela A. McKay of the McKay Law Firm, Chtd., and
3 Defendant/Counter-claimant RENO CAB COMPANY, INC. d/b/a RENO-SPARKS CAB (Reno
4 Cab), by and through its principal, Mr. Roy Street, and its counsel of record, Jonathan Whitehead
5 of Whitehead and Whitehead, hereby submit the following Stipulated Motion to Strike and
6 Vacate the Order on the parties' Cross-Motions for Summary Judgment (Doc. #154).

7 I. FACTUAL AND PROCEDURAL BACKGROUND

8 On August 11, 2015, Atain filed a complaint for declaratory relief against Reno Cab and
9 defendant Richard L. Warne (Warne).

10 On September 3, 2015, Reno Cab answered the Complaint and filed a Counter-Claim. Atain
11 answered the Counter-Claim thereafter.

12 On September 24, 2015, Warne filed an Answer to the Complaint.

13 After the parties engaged in discovery, Warne and Atain entered into a settlement and the
14 Complaint was dismissed against Warne.

15 With regard to Atain and Reno Cab, each party filed their respective dispositive motion. On
16 September 14, 2018, the Court issued an Order granting in part and denying in part said Motions
17 for Summary Judgment and/or Summary Adjudication. (Doc. #154.)

18 Pursuant to the Order for the parties to participate in a mandatory settlement conference (Doc.
19 #158), Atain and Reno Cab participated in a settlement conference on January 9, 2019.

20 The parties reached a settlement conditioned on the Court granting this stipulated Motion to
21 Strike and Vacate the Order granting the dispositive motions in lieu of Atain taking an appeal as
22 a matter of right upon a judgment being entered in this suit.

23 As part of the conditional settlement, Atain requested Reno Cab, including its principal, Mr.
24 Roy Street, and its attorney of record, Jonathan Whitehead to stipulate to a Motion to Vacate and
25 Strike the Order on the Cross-Motions for Summary Judgment. Michael Pintar, co-counsel for
26 Reno Cab, agrees with this stipulated Motion despite not executing the Motion.

27 Mr. Street on behalf of Reno Cab was apprised of the impact of this conditional settlement, if
28 any, through his personal counsel (Mark Simons of Simons Law, P.C.), and he expressly agreed

1 to the conditional settlement on behalf of Reno Cab. Additionally, Reno Cab's counsel of record
2 agreed to the conditional settlement including Atain filing this stipulated Motion.

3 Therefore, Atain and Reno Cab bring this Motion to obtain an Order to complete the
4 conditional settlement.

5 II. LAW AND LEGAL ARGUMENT

6 A. Federal Rule of Civil Procedure 54

7 Federal Rule of Civil Procedure 54(b) governs non-final judgments, including
8 "any order or other decision, however designated, that adjudicates fewer than all the claims or
9 the rights and liabilities of fewer than all the parties." Fed. R. Civ. P. 54(b).

10 Under Rule 54(b), the court has wide latitude to revise prior orders and an order "may be
11 revised at any time before the entry of a judgment" Fed. R. Civ. P. 54(b).

12 In the Ninth Circuit, a district court may vacate a judgment following settlement upon
13 consideration of "the consequences and attendant hardships of dismissal or refusal to dismiss and
14 the competing values of finality of judgment and right to re-litigation of unreviewed disputes."
15 *Am. Games, Inc. v. Trade Prods., Inc.*, 142 F.3d 1164, 1168 (9th Cir. 1998) (quotation marks
16 omitted). No such inquiry is required under Rule 54(b).

17 Under Rule 54(b), district courts have "complete power" over non-final orders and may
18 vacate or revise them "at any time," if doing so would be "consonant with equity." *United States*
19 *Gypsum Co. v. Pac. Award Metals, Inc.*, No. C 04-04941 JSW, 2006 WL 1825705, at *1 (N.D.
20 Cal. July 3, 2006); *De la O v. Arnold-Williams*, No. CV-04-0192-EFS, 2008 WL 4192033, at *1
21 (E.D. Wash. Aug. 27, 2008) (quotation marks omitted).

22 Courts that exercise Rule 54(b) power in the context of settlement have found vacating a
23 prior order is "consonant with equity" if there are no reasons suggesting the order should not be
24 vacated.

25 For example, in *United States Gypsum*, a district court in the Northern District of
26 California vacated several orders under Rule 54(b), including a summary judgment order and a
27 claims construction order, to facilitate settlement. (*United States Gypsum*, 2006 WL 1825705, at
28 *1.) The court in that case required only that the agreement to vacate "was a significant factor in

1 successfully resolving this litigation,” and that there were “no considerations that would justify
2 denial of the motion.” *Id.*

3 Likewise, in *De la O*, the court considered factors such as (1) whether all parties have
4 agreed to vacate the order as a condition of the proposed settlement; (2) whether a former party
5 to the action would be adversely affected by vacating the order; and (3) whether the costs of
6 continuing the action with uncertain results are outweighed by the benefits of the proposed
7 settlement. (*De la O*, 2008 WL 4192033, at *1.)

8 In this case, none of these considerations suggest denying the Stipulated Motion to strike
9 and vacate is appropriate. First, a condition to settling the dispute between the parties is the court
10 granting this motion; hence, the stipulated motion. The proposed resolution also conserves
11 judicial resources in several respects, including not addressing issues on appeal, and those that
12 remain at the district court, including without limitation trial on damages.

13 There is no suggestion that any former party to the case would be adversely affected by
14 striking and vacating the Order since the Order at issue is specific to Atain and Reno Cab.
15 Rather, the parties negotiated a resolution of this entire suit that is conditioned on the court
16 granting this Stipulated Motion. Therefore, granting the Stipulated Motion pursuant to Rule 54 is
17 proper.

18 B. Federal Rule of Civil Procedure 60

19 Federal Rule of Civil Procedure Rule 60 also provides this Court with authority to
20 strike and vacate the Order on the Cross-Motions for Summary Judgment pursuant to a material
21 term to a proposed settlement of this case.

22 In particular, Rule 60(b)(6) provides that a Court may set aside a final judgment or ruling
23 for “any other reason that justifies relief” as the interests of justice require. *See In Re*
24 *International Fibercom, Inc.*, 503 F.3d 933, 940 (9th Cir. 2007) (Rule 60(b)(6) “should be
25 liberally applied” to “accomplish justice”).

26 The decision to vacate an order is addressed to the sound discretion of the district court
27 and gives the court a grand reservoir of equitable power to do justice in a particular case. FRCP
28 60(b), 28 U.S.C.A; *Backlund v. Barnhart*, 778 F.2d 1386 (9th Cir. 1985) (applying Washington

1 law) (decision to vacate reviewed under broad abuse of discretion standard).

2 Here, to facilitate a conditional settlement, and as an express term in their negotiated
3 settlement, Atain and Reno Cab agreed that Atain would file the instant Stipulated Motion to
4 strike and vacate the Court's September 14, 2018 Order (Doc. #154). On similar facts, courts
5 have upheld this request.

6 In *Novell, Inc. v. Network Trade Center*, 187 FRD 657, 660 (D. Utah 1999), the parties to
7 a trademark infringement dispute reached a settlement predicated on partial vacatur of the district
8 court's prior rulings, leaving the remainder of the rulings intact and petitioned the court for a
9 partial vacatur pursuant to FRCP 60(b)(5). *Id.* at 659.

10 The *Novell* court, noting the parties had good reason to seek vacatur, and that settlement,
11 including vacatur, presented a simple and inexpensive way to accommodate both parties'
12 interests, approved the motion and, as requested, vacated some but not all its prior rulings. *Id.* at
13 661. *See also, Lycos v. Blockbuster*, 2010 WL 5437226 (D. Mass. 2010) (partial vacatur
14 approved where settlement contingent on court's granting party's unopposed motion to vacate).

15 Here, the parties agreed as a condition to settlement that Atain would seek vacatur of the
16 Court's September 14, 2018 Order and it would be stricken from the record pursuant to the
17 instant Stipulated Motion.

18 While the settlement agreement between the parties is anticipated to relieve the parties of
19 any further obligations in this case, Atain seeks the instant relief due to the continuing, citable
20 nature of the prior Order, which may detrimentally impact Atain in future cases.

21 Because the parties are willing to resolve the case and forego the appeal, Atain believes
22 the requested relief is justified to promote compromise and avoid expensive appeals. By striking
23 and vacating the Order, Atain obtains the recompense it desires from the resolution and it not
24 compelled to continue to litigate this suit on the issue of damage and then on appeal.

25 The strong public policies of encouraging settlement and conserving judicial resources
26 apply here; the parties submit no reason exists for the Court to not grant this Stipulated Motion.

27 ///

28 ///

[illegible]

Dated: January 15, 2019

/s/ Pamela McKay

PAMELA A. McKAY (SBN 7812)
9320 Sun City Blvd., Suite 104
Las Vegas, NV 89134
T: (702) 835-6956
F: (702) 835-6957
Attorneys for Plaintiff/Counter-Defendant
ATAIN SPECIALTY INSURANCE
COMPANY


By:


Roy Street, Principal

WHITEHEAD & WHITEHEAD

JONATHAN J. WHITEHEAD (SBN 4415)
10389 Double R Blvd.
Reno, NV 89521
Attorneys for Defendant/Counter-Claimant
RENO CAB COMPANY, INC.

IT IS SO ORDERED


U.S. District Judge

CERTIFICATE OF SERVICE

Atain Specialty Insurance Company v. Reno Cab Co, Inc. et al.
3:15-cv-00406-MMD-CBC

I certify that I am employed by McKay Law Firm, Chtd., and that pursuant to LR 5-4, on January 23, 2019, I served a true and correct copy of the foregoing STIPULATED MOTION TO STRIKE AND VACATE ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT (DOC. 154) via CM/ECF to the parties and to their counsel identified below:

<u>COUNSEL OF RECORD</u>	<u>PARTY</u>
Michael A. Pintar, Esq. GLOGOVAC & PINTAR 427 West Plumb Lane Reno, NV 89509 T: (775) 333-0400 F: (775) 333-0412	Attorneys for Defendant/Counter-Defendant, RENO CAB COMPANY, INC.
Jonathan J. Whitehead, Esq. WHITEHEAD & WHITEHEAD 10389 Double R Blvd. Reno, NV 89521 T: (772) 823-7700 F: (775) 823-7709	


PAMELA MCKAY